SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1043

JAMES H. O'HARA,

Petitioner,

versus

DISTRICT OF COLUMBIA

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion of the United States Court of Appeals for the District of Columbia has not yet been officially reported, but is copied in the record (R. 14). No opinion of the District Court below was made in the case.

II

Jurisdiction

The judgment of the United States Court of Appeals below was rendered on December 26, 1944 (R. —). This petition for writ of certiorari was filed in this Court on March 15, 1945. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code,

as amended by Act of February 13, 1925, ch. 229, 43 Stat. 936, Section 347 (a), Title 28, United States Code.

III

Statement of the Case

A full statement of the case has been given in the foregoing petition, under the head "Summary Statement of Matters Involved," and is adopted here as though fully set forth.

IV

Rules of Court Involved

Rule 56 of the Federal Rules of Civil Procedure provides:

"RULE 56. SUMMARY JUDGMENT

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, moved with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

* * * * * * *

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

V

Specification of Errors

1. The Court of Appeals below erred in deciding that a motion for summary judgment in favor of the District of Columbia was granted by the District Court below.

2. The Court of Appeals below erred in adjudicating matters of fact, in the absence of any evidence of record.

3. The Court of Appeals below erred in affirming the judgment of the trial court in the case.

VI

Summary of Argument

1

The Court of Appeals below should not have departed from the usual and accepted course of judicial proceedings, when it departed from the record and decided that a motion for summary judgment in favor of the District of Columbia was granted by the District Court below.

2

The Court of Appeals below departed from the usual and accepted course of judicial proceedings, when it departed from the record and sought to adjudicate matters of fact, in the absence of any evidence of record in the case.

VII

ARGUMENT

Point 1

The Court of Appeals Below Should Not Have Departed From the Usual and Accepted Course of Judicial Proceedings, When It Departed From the Record and Decided That a Motion For Summary Judgment In Favor of the District of Columbia Was Granted by the District Court Below.

It is obvious that the Court of Appeals below failed to carefully examine the record then before it for consideration. For this record fails to show in its body that the District of Columbia ever filed in the case a motion for summary judgment in its favor. Summary judgments in the trial court are authorized by Rule 56 of the Federal Rules of Civil Procedure, the pertinent parts of which are set forth in this brief, but such rule was not mentioned or referred to in the motion which was actually filed in the case by the District of Columbia. For it reads as follows (R. 10):

"Motion for Summary Judgment in Favor of Plaintiff

Plaintiff moves the court as follows:

> To order entry of judgment in favor of the plaintiff on the ground that there is no genuine issue as to any material fact, and that plaintiff is entitled to a judgment as a matter of law."

The name or title of the above motion contains the word "summary", but such name or title does not determine the character of the motion.

> "It is not necessary to give any name to a pleading, nor is the name, if given, controlling, since the charac-

ter of a pleading is determined by its allegations of subject matter and legal effect."

49 Corpus Juris, section 9, p. 35; citing Farmers' State Bank v. Kirkland, 200 Ala. 146; Commonwealth v. Wakelin, 230 Mass. 567, 571; Lopp v. Lopp, 181 N. Y. S. 476.

"The name given to the motion itself is unimportant where the forms of motion have been abolished in practice, the character of the motion being determined by the facts and the relief authorized to be granted."

42 Corpus Juris, section 31, p. 478; citing Phillips v. Gammon, 188 Ind. 497; Ginn v. Knight, 196 Okl. 4.

POINT 2

The Court of Appeals Below Should Not Have Departed From the Usual and Accepted Course of Judicial Proceedings, When It Departed from the Record and Sought to Adjudicate Matters of Fact, in the Absence of Any Evidence of Record in the Case.

The record discloses the so-called summary judgment entered by the trial court and, if such be valid and in response to a valid motion therefor, it determined that there is no genuine issue as to any material fact in the case and that the District of Columbia is entitled to a judgment as a matter of law. Such proceedings, therefore, deprive the parties-litigant of the right to adduce evidence in support of their rights contended for, and before a jury which was demanded by the defendants. (R. 10.) yet in the absence in the record of any evidence, the Court of Appeals below by its opinion attempted to adjudicate divers matters of fact and, by so doing, decided matters beyond its jurisdiction, and its judgment is not only erorneous but abso-

lutely void. In Windsor v. McVeigh, 93 U. S. 274, 282, this Court aptly said:

> "Though the court may possess jurisdiction of the cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure. It must act judicially in all things, and cannot then transcend the power conferred by the law."

And in Reynolds v. Stockton, 140 U. S. 254, 268, this Court said:

> "A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as to conclude a point upon which the parties have not been heard."

Not only this, but the Record (App. R. 12) shows that the trial Court, acting through Justice Pine, had entered a previous order denying the motion of the District of Columbia for a judgment in its favor. Such motion was identical in language to that which was later made and submitted to the trial Court, with Justice Bailey sitting. So, if Justice Pine's judgment be valid then there are genuine issues of fact which warrant a trial. This judgment has never been modified, vacated, or set aside, and stands in full force and effect in the case. This judgment precluded any subsequent judgment upon another like motion. It is *res judicata.*

> "If the motion has been already decided, it seems that the order must first be opened or set aside, and it has been held that a motion once overruled cannot be called up for rehearing by the defeated party until upon proper notice to his adversary the order has been set aside.
>
> Townsend v. Wisner, 62 Iowa, 672.

Conclusion

It is respectfully submitted that this case is one calling for the exercise by this Court of its power of supervision and that a writ of certiorari should be granted as prayed in the petition, to the end that relief may be granted your petitioner herein, and the case reversed.

Respectfully submitted,

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